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Sex Discrimination in Athletics

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COMMENTS

SEX DISCRIMINATION IN ATHLETICS

I. INTRODUCTION

Those seemingly endless years spent in school serve to instruct the juvenile audience in considerably more than the basic skills of reading, writing, and summing. The schools further the socialization process begun by the family and either reinforce or alter what the children have already learned concerning their place in society and the type of behavior expected of them.[1] This is reflected in the enormous impact the formal education process has in inculcating traditional sexual roles and stereotypes. If girls are sent to classes in home economics and boys to classes in mechanical drawing and automotive mechanics, the message is clear — the man's role is to enter the job market and bring home the bacon and the woman's place is to remain at home and fry it.[2]

School-sponsored athletic programs, long considered an integral part of education,[3] have also served to reinforce sexual stereotypes. Discrimination in athletics on the basis of sex has been the subject of much controversy[4] and has generated many scholarly articles.[5] Notwithstanding previous efforts in the field, further examination of the problem is warranted

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1. *See* Comment, *Title IX of the 1972 Education Amendments: Preventing Sex Discrimination in Public Schools,* 53 TEXAS L. REV. 103, 103–04 (1974) [hereinafter cited as *Preventing Sex Discrimination*]. *See generally* Comment, *Sex Discrimination, The Textbook Case,* 62 CALIF. L. REV. 1312 (1974); Comment, *Teaching Woman Her Place: The Role of Public Education in the Development of Sex Roles,* 24 HASTINGS L.J. 1191 (1973).

2. *See* note 1 *supra. See also* Kirp, *Schools as Sorters: The Constitutional and Policy Implications of Student Classification,* 121 U. PA. L. REV. 705, 733–37 (1973).

3. *See, e.g.,* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 18 (1971); United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 891 (5th Cir. 1966), *aff'd en banc,* 380 F.2d 385 (5th Cir.), *cert. denied,* 389 U.S. 840 (1967).

4. An example of the controversy surrounding sex discrimination in school-sponsored athletics was the reaction to the regulations proposed by the Department of Health, Education and Welfare (HEW), 39 Fed. Reg. 22228–22240 (1974), which were promulgated pursuant to Title IX of the 1972 Education Amendments, 20 U.S.C. §§ 1681 *et seq.* (Supp. V, 1975). During the interim between publication and adoption of the regulations, HEW invited interested parties to submit comments, objections, and suggestions. Over 9,700 responses were received, many of them relating to section 86.36, the regulation governing administration of athletic programs. *See* 40 Fed. Reg. 24128, 24134 (1975).

5. *See* Stroud, *Sex Discrimination in High School Athletics,* 6 IND. L. REV. 661 (1973); *Preventing Sex Discrimination, supra* note 1; Comment, *Equality in Athletics: The Cheerleader v. The Athlete,* 19 S.D.L. REV. 428 (1974) [hereinafter cited as *Equality in Athletics*]; Note, *Sex Discrimination in High School Athletics,* 57 MINN. L. REV. 339 (1972). For a more recent discussion of the problem, *see* Note, *Sex Discrimination and Intercollegiate Athletics,* 61 IOWA L. REV. 420 (1975).

in light of the adoption of Title IX of the 1972 Educational Amendments (Title IX)[6] and the regulations promulgated pursuant thereto,[7] particularly section 86.41, which sets forth guidelines for the administration of athletic programs.[8]

Using applicable common law and statutory standards, this comment will examine from several perspectives the constitutionality of section 86.41 of the Title IX regulations. Part II concentrates on the standard of review articulated by the Supreme Court of the United States in equal protection challenges to sex-based laws. Part III analyzes the manner in which state and federal courts have resolved cases involving sex discrimination in athletics. The constitutionality of section 86.41 is the focus of Part IV. Following a general survey of the scope of Title IX, section 86.41 is measured against the statutory goals and standards developed by Congress in its attempt to deal with sex bias and is analyzed in light of the constitutional standards utilized by the Supreme Court.

II. THE SUPREME COURT DECISIONS: A DIFFERENT BALLGAME

Prior to its decision in *Reed v. Reed*,[9] the Supreme Court had never found a sex-based classification to be violative of the guarantees of equal protection contained in the fifth and fourteenth amendments.[10] The Court analyzed claims that sex-based statutory distinctions violated the equal protection clause of the fourteenth amendment by inquiring whether a rational relationship[11] existed between the classification and a permissible

6. 20 U.S.C. §§ 1681 *et seq.* (Supp. V, 1975).

7. 45 C.F.R. §§ 86.1 *et seq.* (1975). The final version of the regulations became effective on July 21, 1975.

8. *Id.* § 86.41.

9. 404 U.S. 71 (1971).

10. Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 876 (1971) [hereinafter cited as Brown]. Application of the rational relation or minimum scrutiny standard of review, coupled with the Court's acceptance of stereotyped notions of a woman's capabilities and need for protection, dictated this result. *See* notes 11–14 and accompanying text *infra*.

11. 404 U.S. at 78–79. For an influential discussion of the theoretical basis of the rational relation test, *see* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949). In Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911), the court articulated the classic statement of the practical application of the rational relation test:

> The equal protection clause of the fourteenth amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary . . . . A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality . . . . When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed . . . . One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis . . . .

Id. at 78. *See also* Jefferson v. Hackney, 406 U.S. 535, 546 (1972); Dandridge v. Williams, 397 U.S. 471, 485 (1970); McGowan v. Maryland, 366 U.S. 420, 425 (1961).

state objective.[12] Under the rational relation test, a strong presumption existed in favor of the constitutionality of the classification employed in the challenged statute or regulation; the burden was upon the complainant to demonstrate that the classification was wholly without a rational basis and was, in fact, premised upon factors totally irrelevant to the achievement of a permissible state purpose.[13] Since some relationship between the classification and the statutory purpose could usually be perceived, the application of this standard frequently resulted not in minimum scrutiny, but in no scrutiny at all.[14]

Reed v. Reed signaled the advent of a new standard of constitutional review in sex discrimination cases. In *Reed,* the Court struck down an Idaho law giving automatic preference to males in administering a decedent's estate when male and female relatives were similarly situated[15] on the ground that the arbitrary preference in favor of males could not withstand the mandate of the equal protection clause.[16] The Court summarized the applicable standard of review as follows:

> [The statute] provides that different treatment be accorded to the applicants on the basis of their sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause . . . . The Equal Protection Clause . . . does . . . deny to States the power to legislate that different treatment be accorded to persons placed by a

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12. For example, in Quong Wing v. Kirkendall, 223 U.S. 59 (1912), Montana imposed a license fee for all those engaged in the laundry business with the exception of establishments which employed more than two women. The Court approved the exemption, observing that "the Fourteenth Amendment does not interfere by creating a fictitious equality where there is a real difference." *Id.* at 63. In Goesaert v. Cleary, 335 U.S. 464 (1948), a statute prohibiting women from working as bartenders unless they were wives or daughters of male tavern proprietors was found to be a reasonable exercise of the state's power to "reduce or eliminate moral and social problems." *Id.* at 446. Hoyt v. Florida, 368 U.S. 57 (1961), was one of the last cases wherein a sex-based classification under equal protection attack was saved by minimum scrutiny. The *Hoyt* Court found itself unable to conclude that automatic exemption from jury service for women was not based upon a reasonable classification since "woman is still regarded as the center of home and family life." 368 U.S. at 62. *Hoyt* was subsequently overruled by Taylor v. Louisiana, 419 U.S. 522, 533–37 (1975).

In addition to rejecting equal protection attacks upon sex-based classifications, the Court rejected other constitutional challenges to statutes employing sexual classifications. *See, e.g.,* Muller v. Oregon, 208 U.S. 412 (1908) (statute prohibiting employment of women in factories and laundries for more than 10 hours per day upheld against challenge based upon right to contract); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) (privileges and immunities clause does not compel states to admit women to the practice of law).

13. *See* note 11 *supra.*

14. Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 8 (1972).

15. 404 U.S. at 71. The statute provided in pertinent part: "[O]f several persons claiming and equally entitled to administer, males must be preferred to females . . . ." *Id.* at 73, *quoting* IDAHO CODE § 15–314 (1948).

16. 404 U.S. at 76. It is interesting to note that Ms. Reed made no assertion that the classification denied her any fundamental right to administer her deceased son's estate. The Court, moreover, rejected her argument that sex was a suspect classification. *See* Ginsberg, *Gender and the Constitution,* 44 CINN. L. REV. 1, 17 (1975); notes 25–27 *infra.*

> statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and *must rest upon some ground of difference having a fair and substantial relation to the object of the legislation,* so that all persons similarly circumstanced shall be treated alike."[17]

Significantly, the state's justification of administrative convenience was rejected, despite the Court's admission that it "was not without some legitimacy."[18] This unwillingness to accept the state's rationale makes it clear that more than minimum scrutiny was being used, since virtually any conceivable justification had, in the past, saved the classification under that standard.[19] The alleged objective of the statutory scheme in *Reed* was to "establish degrees of entitlement of various classes of persons in accordance with their varying degrees and kind of relationship to the intestate."[20] This was a permissible objective, but the sex-based classification did not rest upon a difference bearing a "fair and substantial" relation to that objective. *Reed,* then, stands for the proposition that "degrees of entitlement of various classes of persons" to perform such duties as the administration of an estate must be determined upon an *individual* basis, without regard to sex.[21]

Two years after *Reed,* the Court again rejected administrative convenience as a justification for the different treatment accorded similarly situated men and women. In *Frontiero v. Richardson,*[22] the Court invalidated a statutory scheme which presumed that wives of servicemen were dependents for purposes of obtaining increased fringe benefits, but that husbands of servicewomen were not dependents unless it could be demonstrated that they actually relied upon their wives for one-half of their support.[23] Four members of the Court, relying upon *Reed,* declared that

17. 404 U.S. at 76, *quoting* Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (emphasis added).

18. 404 U.S. at 76.

19. *See* note 14 and accompanying text *supra.* Nevertheless, after setting forth the applicable standard of review, Chief Justice Burger, speaking for the Court, stated that the question presented by *Reed* was whether the sex of the parties competing for letters of administration bore a *rational relation* to the state objective. 404 U.S. at 76. Although it seems clear that the rational relation test (*see* notes 10–13 and accompanying text *supra*) was not being applied in *Reed,* some courts have used this language to uphold different treatment of the sexes in school-sponsored athletics. *See* notes 109–11 and accompanying text *infra.*

20. 404 U.S. at 77.

21. This conclusion has also been reached via a due process rather than an equal protection route. *See* notes 76 & 201 *infra.*

22. 411 U.S. 677 (1973).

23. *Id.* at 679–80. Since it was alleged that the federal government had violated the plaintiff's right to equal protection, *Frontiero* was decided upon the due process clause of the fifth amendment because the fourteenth amendment's limitations apply only to the states. However, as the High Court has noted, although the fifth amendment contains no equal protection clause, it does forbid discrimination that is "so unjustifiable as to be violative of due process." *Id.* at 680 n.5, *quoting* Schneider v. Rusk, 377 U.S. 163, 168 (1964); *see* Johnson v. Robinson, 415 U.S. 361 (1974), wherein the Court observed that the fifth amendment imposes the same equal protection standards upon the federal government as the fourteenth amendment imposes upon the states. *Id.* at 364–65 n.4.

classifications based upon sex were inherently suspect and must be subjected to strict scrutiny,[24] which is the applicable standard whenever a fundamental right[25] or a suspect classification[26] is involved in a case, and which requires the state to demonstrate that the classification is necessary to advance a compelling state interest and that it is the only means of doing so.[27]

Although its impact was diminished by the fact that only a plurality of the Court joined in declaring gender to be a suspect classification,[28] *Frontiero,* together with *Reed,* appeared to indicate that laws "premised upon overbroad generalizations"[29] concerning the nature of the sexes

24. 411 U.S. at 686–87. Justice Brennan, author of the plurality opinion, explained the decision as follows:

> [S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . .' And what differentiates sex from such nonsuspect statutes as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform . . . . As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the *entire class* of females to inferior legal status *without regard to the actual capabilities of its individual members.*

Id., quoting Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972) (emphasis added).

Only a plurality of the Court — Justices Brennan, Douglas, Marshall, and White — joined in declaring sex a suspect classification. Justice Stewart, citing *Reed,* concurred in a one-sentence opinion. *Id.* at 691 (Stewart, J., concurring). Justices Powell and Blackmun and Chief Justice Burger also found that *Reed* was sufficient authority to support the result in *Frontiero,* and argued that it was unnecessary for the Court to go any further, especially in light of the ongoing ratification of the Equal Rights Amendment among the states "which, if adopted will resolve this precise question." 411 U.S. at 692 (Powell, J., concurring). For further discussion of the potential impact of the Equal Rights Amendment, *see* note 202 *infra.*

25. A fundamental right is one either implicitly or explicitly protected by the Constitution. San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1, 33–34 (1972); *see* Harper v. Virginia Bd. of Electors, 383 U.S. 663, 667–70 (1966) (the right to vote is a fundamental right); Roe v. Wade, 410 U.S. 113 (1973) (reproductive freedom and the right to privacy are fundamental rights); Shapiro v. Thompson, 394 U.S. 618 (1969) (the right to travel is a fundamental right).

26. The suspect class concept evolved in the adjudication of suits involving racial discrimination. Any classification based upon race has been held to be automatically suspect, with the burden upon the state to demonstrate that the distinction was necessary to the accomplishment of a compelling state interest in the sense that no other classification would serve the purpose. *See, e.g.,* McLaughlin v. Florida, 379 U.S. 184, 196 (1965). National ancestry and alienage have also been designated as suspect classifications. *See* Korematsu v. United States, 323 U.S. 214 (1944).

27. *See* Roe v. Wade, 410 U.S. 113, 155 (1973); Shapiro v. Thompson, 394 U.S. 618, 634 (1969). The state must demonstrate that there were no alternative means available to accomplish the legitimate objective, and that the classification was drawn as narrowly as possible. *Id.*

28. *See, e.g.,* Stanton v. Stanton, 421 U.S. 7, 17 (1975); Vorcheimer v. School Dist., 532 F.2d 880, 886 (3d Cir.), *cert. granted,* 45 U.S.L.W. 3505 (U.S. Oct. 19, 1976) (No. 7637).

29. Schlesinger v. Ballard, 419 U.S. 498, 507–08 (1975). In *Reed,* the generalization presumably was that women were less competent and less interested in administering estates than men. In *Frontiero,* the statutory scheme presumed that women were, by and large, totally dependent upon their husbands for support. Incidentally, this assumption was not borne out by the evidence. *See* 411 U.S. at 688–90.

would no longer be subject to minimum scrutiny, but would fall under the new standard of review being applied. The emerging standard emphasized the importance of making benefits available to all citizens upon the basis of individual capabilities, rather than upon stereotyped judgments employed for the convenience of the administrator.

Whatever light *Reed* and *Frontiero* had shed upon the standard of review by which sex-based classifications were to be judged was dimmed by *Kahn v. Shevin*,[30] and nearly extinguished by *Geduldig v. Aiello*[31] and *Schlesinger v. Ballard*.[32] *Kahn* involved a Florida statute providing a $500 property exemption for widows, but no corresponding exemption for widowers. The Court relied upon *Reed* in upholding the law against an equal protection challenge.[33] The different treatment allotted to widows and widowers was found to rest upon a ground of difference having a fair and substantial relation to the object of the legislation[34] — cushioning "the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionately heavy burden."[35] The *Kahn* Court appeared to create an exception for sex-based laws which can survive the *Reed* test because the object of the legislation was to benefit women.[36]

The *Kahn* decision arguably represented a retreat from the positions taken in *Reed* and *Frontiero*.[37] If sex is a suspect classification, a gender-based law can survive only if a compelling state interest can be demonstrated to justify its existence. Assuming, *arguendo,* that remedying effects of past economic discrimination is a compelling state interest, Florida's property exemption for widows should nonetheless have been adjudged unconstitutional because it is overinclusive in granting benefits to those women who have never suffered the injury of economic discrimination. Such overclassification by sex is unjust and, moreover, is redolent of the administrative convenience rationale rejected by the Court in *Reed* and *Frontiero*.[38] If, however, sex is not a suspect class and middle level

30. 416 U.S. 351 (1974).
31. 417 U.S. 484 (1974).
32. 419 U.S. 498 (1975).
33. 416 U.S. at 352.
34. *Id.* at 355–56.
35. *Id.* at 355.
36. It is interesting to note that even though Mr. Justice Douglas, author of the *Kahn* opinion, joined the *Frontiero* plurality in declaring sex a suspect class, he made no mention of sex as a suspect classification in *Kahn*. *Frontiero* was distinguished on the ground that the law therein discriminated against women *"solely* for administrative convenience." 416 U.S. at 355 (emphasis supplied by court). Mr. Justice Douglas implied that *Frontiero* itself had carved out an exception for statutes "designed to rectify the effects of past discrimination against women." 416 U.S. at 355 n.8. Another distinction between *Frontiero* and *Kahn* was found in the fact that the latter case involved a classification for purposes of taxation. The Court stated:

> A state tax law is not arbitrary although it "discriminate[s] in favor of a certain class . . . if the discrimination is founded upon a reasonable distinction, a difference in state policy," not in conflict with the Federal Constitution.

Id. at 355, *quoting* Allied Stores v. Bowers, 358 U.S. 522, 528 (1959).
37. *See* 416 U.S. at 357–360 (Brennan, J., dissenting), 360–62 (White, J., dissenting).
38. 416 U.S. at 355 & n.8.

scrutiny is to be applied, it is nevertheless difficult to see how a $500 property exemption for all widows bears a substantial relation to the statutory purpose of remedying past economic discrimination.[39] Regardless of the standard of review being applied, two things seemed clear after *Kahn*: 1) sex was not a suspect classification, and 2) classifications based upon gender would withstand the fair and substantial relation test, provided the object of the legislation could be construed as beneficial to women.

The question of what constitutes a gender-based classification became obscured in *Geduldig v. Aiello,*[40] which involved a challenge to California's disability insurance system.[41] Along with drug addiction, dipsomania, and sexual psychopathology, normal pregnancy was among the disabilities excluded from coverage under the state system.[42] The Court, applying minimum scrutiny rather than the middle level scrutiny of *Reed,* upheld the pregnancy exclusion against an equal protection attack, stating that if, in the case of social welfare programs, a rational basis for the "line drawn by the State" could be found, the courts would not intervene.[43] The Court found California's policy decision to keep contributions low while providing adequate coverage for those risks that were included to be a sufficient justification for excluding normal pregnancy, which, if included, would force an increase in the cost of employee contributions.[44] Significantly, Mr. Justice Stewart, speaking for the Court, stated that no gender-based classification was involved[45] since the California plan divided participants into two groups — pregnant women and nonpregnant persons.[46]

39. *See id.* at 352 & n.1; FLA. STAT. ANN. § 196.202 (Supp. 1974–75). Because Florida had provided the exemption for widows since 1885, it is doubtful that the legislative object was to remedy the effects of past economic discrimination against women. Rather, the motive was probably protective and paternalistic in nature. *See id.*

40. 417 U.S. 484 (1974).

41. *Id.* at 487–89.

42. *Id.* at 488–89. It should be noted that the statute in *Geduldig* had been interpreted by the California state courts to cover disabilities resulting from abnormal pregnancy. *Id.* at 490.

43. *Id.* at 495. The court relied upon three cases in which minimum scrutiny was used and the statutory classifications upheld. *See* Jefferson v. Hackney, 406 U.S. 535 (1972); Dandridge v. Williams, 397 U.S. 471 (1970); Williamson v. Lee Optical Co., 384 U.S. 483 (1955).

44. 417 U.S. at 495–96.

45. *Id.* at 496–97 & n.20. The court rationalized its findings that the statutory scheme did not employ a sex-based classification as follows:

> [T]his case is thus a far cry from cases like *Reed v. Reed* . . . and *Frontiero v. Richardson* . . . involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition — pregnancy — from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex based classification.
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> . . . .
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> The new program divides potential recipients into two groups — pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.

Id. at 496–97 n.20 (citations omitted).

46. *Id.*

Gedulig's deviation from *Reed* and *Frontiero* cannot be fitted into the special category for laws benefitting women created by *Kahn*.[47] It is true, as the Court noted, that not all women will become pregnant, but neither will all men undergo prostectomies, a procedure covered by the California plan.[48] Pregnancy is gender linked, and the *Geduldig* Court seemingly approved a double standard by upholding a statutory scheme that excluded a medical condition affecting women only, while extending coverage to ailments afflicting solely, or primarily, men.[49]

Schlesinger v. Ballard[50] further confused the question of when the Court would find that men and women were similarly situated — a prerequisite to a finding of discrimination.[51] In *Schlesinger*, the petitioner challenged the Navy's separation statutes which permitted men to serve for 10 years before mandatory separation for want of promotion, while women were entitled to serve for 13 years before such separation was required.[52] The Court found that, because men and women were not similarly situated with regard to opportunities for professional advancement, Congress could rationally accord different treatment to women as compensation for the deprivation of equal opportunity to compile service records comparable to those of male officers.[53] No inquiry into the validity of the deprivation was made. The Court approved discrimination against men in the tenure statutes to compensate for discrimination against women during the period of tenure.[54] It is unclear what standard of review was used in *Schlesinger*,

47. It is difficult to reconcile the *Geduldig* decision with *Kahn*, where a direct benefit inured to all women, since in *Geduldig* women who experienced normal pregnancy and childbirth were not entitled to collect payments from a fund to which they had contributed during their working years. *See id.* at 487–89.

48. *Id.* at 501 (Brennan, J., dissenting).

49. *Id.*

50. 419 U.S. 498 (1975).

51. *See, e.g.*, F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). *See generally* Tussman & tenBroek, *supra* note 11. The same authors have observed:

> The Constitution does not require that things different in fact be treated in law as though they were the same. But it does require . . . that those who are similarly situated be similarly treated. The measure of the reasonableness of a classification is the degree of its success in treating similarly those similarly situated.

TUSSMAN & TENBROEK, SELECTED ESSAYS 1938–62, at 789 (1963).

52. 419 U.S. at 499–500. The plaintiff premised his suit upon a denial of due process under the fifth amendment. As in *Frontiero*, the Court applied an equal protection analysis. 419 U.S. at 500 n.3; *see* note 23 *supra*. In Weinberger v. Weisenfeld, 420 U.S. 636 (1975), which involved another due process challenge to a sex-based law, the Court observed: "This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Id.* at 638 n.2 (citations omitted).

53. 419 U.S. at 508. The statutory scheme forbade the assignment of women to duty in aircraft engaged in combat missions and any naval vessels other than hospital ships and transports; therefore, the Court found that their opportunities for advancement were limited. *Id.* at 508, *citing* 10 U.S.C. § 5015 (1970).

54. Mr. Justice Brennan, dissenting in *Schlesinger*, criticized the Court's failure to acknowledge the existence of the underlying discrimination. 419 U.S. at 511–12 n.1 (Brennan, J., dissenting). Justice Brennan noted that the restrictions upon women officers' opportunities for service had not been attacked, but observed that the Court should have at least considered their validity before upholding a classification built upon them. *Id.*

but if one concludes that the *Reed* test[55] was employed, that test had been diluted almost beyond recognition. If the object of the longer tenure was to give women officers "fair and equitable career advancement programs,"[56] it is difficult to understand how this goal was *fairly* and substantially promoted by providing women an additional 3 years to serve on hospital ships instead of giving them an equal opportunity to compete with men for promotion.[57]

The two sex discrimination decisions subsequent to *Schlesinger* marked a return to the middle level standard of review. In *Weinberger v. Weisenfeld*,[58] the Court voided a provision of the Social Security Act which granted benefits to widows with children but denied them to widowers.[59] The statute was found to be based upon an "archaic and overbroad generalization"[60] which, contrary to the argument advanced by the government, injured women rather than benefitted them.[61]

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55. *Reed* and *Frontiero* were distinguished by the *Schlesinger* Court as involving statutory classifications based upon "archaic and overbroad generalizations" employed solely for administrative convenience. 419 U.S. at 507. It was not explained why the exclusion of women officers from combat duty was not an archaic and overbroad generalization.

56. 419 U.S. at 508, *quoting* H.R. REP. No. 216, 90th Cong., 1st Sess. 17 (1967).

57. Clearly, *Schlesinger* can be reconciled with *Kahn* in that the Court perceived both statutory schemes as granting benefits to women in order to compensate for past inequities. *See* note 36 and accompanying text *supra*.

58. 420 U.S. 636 (1975). *Weinberger* was decided on the basis of the equal protection guarantee of the fifth amendment's due process clause. *Id.* at 638 n.2; *see* notes 25 & 52 *supra*.

59. 420 U.S. at 643–44. Section 202 of the Social Security Act, 42 U.S.C. § 402(g) (Supp. V, 1975), *amending* 42 U.S.C. § 402(g) (1970), made benefits based upon earnings of a deceased husband and father payable to the widow and the couple's minor children in her care. Benefits based on the earnings of a deceased wife and mother, however, were payable only to the minor children. *Id.* § 402(d). The plaintiff, a widower, was unable to collect Social Security survivor's benefits which, had he been a woman, would have enabled him to receive the same dollar amount in benefits as his child received while he remained at home to care for the child. *See id.* §§ 402(d)(2), (g)(2). If a widowed mother elected to go to work, the amount of benefits was reduced $1 for every $2 earned annually above $2400. *Id.* §§ 403(b), (f).

60. 420 U.S. at 644–45. The "archiac and overbroad generalization" underlying the sex-based classification embodied in the Social Security Act was that the earnings of the male are vital to the family's support, while those of a woman are not. *Id.* The Court noted that although the assumption was not without empirical support, it did not justify the deprivation of benefits with respect to survivors of women whose earnings contributed significantly to the support of their families. *Id.*

61. The Government, relying upon *Kahn*, argued that section 402(g) was designed to compensate women for past economic discrimination. 420 U.S. at 648. However, the Court noted that the legislative history of section 402(g) indicated that Congress intended to make it economically feasible for women to remain at home with their children — a choice women, but not men, would presumably make. *See* ADVISORY COUNCIL ON SOCIAL SECURITY, 1937 FINAL REPORT 31; ADVISORY COUNCIL ON SOCIAL SECURITY, REPORTS ON THE OLD AGE, SURVIVORS, AND DISABILITY INSURANCE AND MEDICARE PROGRAMS 30 (1971).

In *Stanton v. Stanton*,[62] the Court struck down a Utah law which specified a greater age of majority for males than for females.[63] Mr. Justice Blackmun, speaking for the Court, found it "unnecessary to decide whether a classification based upon sex is inherently suspect"[64] because this particular classification could not stand under any test — rational relation, compelling state interest, or "something in between."[65] The Court found that the classification violated the fourteenth amendment's guarantee of equal protection because it imposed "criteria wholly unrelated to the objective of the statute."[66]

Any attempt to analyze the line of decisions from *Reed* to *Stanton* produces, as one court remarked, "an uncomfortable feeling, somewhat similar to a man playing a shell game, who is not absolutely sure there is a pea."[67] Still, some conclusions can be reached. First, even though a majority of the Supreme Court has declined to view sex as a suspect classification,[68] the Court has approved a stricter standard of review for testing the validity of gender-based classifications.[69] The purpose and effect of the legislation at issue is examined, and if the Court finds that the purpose was premised upon an archaic and overbroad generalization concerning the nature of the sexes, the statute will probably be struck down,[70] unless it can be demonstrated that the effect of the statute is remedial.[71] If the effect of the classification was to deny to women a benefit which has been extended to men, the statute will most likely be struck down,[72] unless the Government can demonstrate that a cost increase of considerable proportions would result from extension of the benefit.[73]

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62. 421 U.S. 7 (1975).

63. *Id.* at 13–17. Under the challenged statute, the age of majority for females was set at 18 while for males it was 21. UTAH CODE ANN. § 15–2–1 (1953). The case arose in the context of an action for support which the plaintiff brought against her former husband when he ceased making child support payments after his daughter reached age 18. 421 U.S. at 9.

64. *Id.* at 13.

65. *Id.* at 17.

66. *Id.* at 14.

67. Vorchheimer v. School Dist., 400 F. Supp. 326, 340–41 (E.D. Pa. 1975), *rev'd*, 532 F.2d 880 (3d Cir.), *cert. granted*, 45 U.S.L.W. 3305 (U.S. Oct. 10, 1976) (No. 76–37). The district court opinion by Judge Newcomer contains an excellent analysis of the Supreme Court's sex discrimination decisions.

68. *See* Kahn v. Shevin, 416 U.S. 351 (1974); notes 36 & 64 and accompanying text *supra.*

69. *See* Reed v. Reed, 404 U.S. 71, 75 (1971); notes 15–20 and accompanying text *supra.*

70. *See* Stanton v. Stanton, 421 U.S. 7, 14–15 (1975); Weinberger v. Weisenfeld, 420 U.S. 636, 642–43 (1975); notes 19 & 58–66 and accompanying text *supra.*

71. *See* Schlesinger v. Ballard, 419 U.S. 498, 508 (1975); Kahn v. Shevin, 416 U.S. 351, 355 & n.8 (1974); notes 38 & 61 and accompanying text *supra.*

72. *See* Stanton v. Stanton, 421 U.S. 7, 13 (1975); Reed v. Reed, 404 U.S. 71, 75 (1971).

73. *See* notes 38–47 and accompanying text *supra.*

If this can be shown, and the Court can style the legislation as economic or social in nature, then the plaintiff must contend with the possibility that minimum scrutiny will be applied and the classification upheld.[74] In any event, two threads running through the series of Supreme Court cases dealing with sex discrimination which emphasizes a definite change in judicial attitude may be detected: 1) the Court's willingness to brush aside "archaic and overbroad" generalizations about women's nature, interests, and needs,[75] and 2) the emphasis upon granting benefits based upon an evaluation of individual capacity.[76]

III. SEX DISCRIMINATION IN ATHLETICS: THE THRILL OF VICTORY AND THE AGONY OF DEFEAT

A. *Recent Decisions*

Although a relatively recent phenomenon,[77] suits challenging restrictions placed upon the participation of women in sports are increasing in number and "may be the best illustration of female impatience with women's place."[78] Most of the suits have been premised upon the theory

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74. *See id.*

75. *See* notes 55 & 60 *supra.*

76. *See* Reed v. Reed, 404 U.S. 71 (1971); notes 17–20 and accompanying text *supra.*

The emphasis in *Reed* upon the importance of the individual's capacity to perform has also surfaced in recent Supreme Court sex discrimination cases decided under the due process theory. The statutory classifications in Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974), and Stanley v. Illinois, 405 U.S. 645 (1972), were both invalidated because they employed irrebuttable presumptions concerning the sex-based classifications involved, which destroyed the very purpose of the legislation. In *Stanley,* the statute presumed that an unwed father was an unfit parent who, if the mother were deceased, would not be entitled to custody of the couple's children. 405 U.S. at 646. The legislative purpose was to promote the best welfare of the children, but no opportunity was provided the unwed father to show that the children's welfare would be promoted by remaining in his care. *Id.* at 652–55.

In *LaFleur,* mandatory maternity leaves for schoolteachers were intended to protect the pregnant teacher's health and to maintain good classroom performance. 414 U.S. at 640–41. The presumption was that all pregnant teachers became physically unable to perform their duties at a certain designated point of pregnancy. *Id.* at 644. There was no examination of an individual teacher's health, and no opportunity was given her to demonstrate that she could continue to teach. *Id.* Moreover, under the rules, a teacher could be forced to leave in midyear, which could be detrimental to her students. *Id.* at 643.

The irrebuttable presumptions doctrine is a potent weapon that is employed by the Court only when the presumption places a burden upon a constitutionally protected right. *Id.* at 652 (Powell, J., concurring) 657–60 (Rehnquist, J., dissenting).

77. The few suits concerning sex discrimination in athletics brought prior to 1970 involved challenges by professional female athletes to the failure of the state sports commissions to issue licenses to them. *See* Hesseltine v. State Athletic Comm'n, 6 Ill. App. 2d 129, 126 N.E.2d 631 (1955); Calzadilla v. Dooley, 29 App. Div. 2d 152, 286 N.Y.S.2d 510 (Sup. Ct. 1968); State v. Hunter, 208 Ore. 282, 300 P.2d 455 (1956).

78. B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW 1020 (1975). The reason for female impatience becomes apparent when some of the challenged restrictions against women in athletics are inspected. The typical restrictions followed a similar pattern: a prohibition against teams composed

that the segregation of athletic teams by sex violates the equal protection clause of the fourteenth amendment.[79]

In deciding cases which have challenged sex-based restrictions in athletics, courts have focused upon the following four factors: 1) whether the plaintiffs were totally denied the opportunity to take part in a particular sport;[80] 2) the appropriate standard of review;[81] 3) whether

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of members of both sexes coupled with a prohibition of competition between men's and women's teams. For example, in Brenden v. Independent School Dist., 342 F. Supp. 1224 (D. Minn. 1972), *aff'd*, 477 F.2d 1292 (8th Cir. 1973), the court dealt with the following regulation:

> "Girls shall be prohibited from participation in the boys' interscholastic athletic program either as a member of the boys' team or a member of the girls' team playing the boys' team. The girls' team shall not accept male members."

Id. at 1227, *quoting* MINNESOTA STATE HIGH SCHOOL LEAGUE OFFICIAL HANDBOOK, 1971–72, Athletic Rules for Girls, Article III, Section 5. The court in Bucha v. Illinois High School Ass'n, 351 F. Supp. 69 (N.D. Ill. 1972), was confronted by the following school athletic rule:

> "No school belonging to this Association shall permit girls to participate in interscholastic athletic contests with the following specific exceptions: Interscholastic contests in archery, badminton, bowling, fencing, golf, gymnastics, swimming, tennis and track and field may be permitted, and sports days may be held in basketball, field hockey, soccer, softball and volleyball provided: that each sport included in sports days is taught by a girls' physical education teacher as part of the girls' physical education curriculum and intramural programs; that no girl shall participate in more than one sport at any sports day; that no school shall be permitted to enter girls in more than four sports days in the same sport during a school year . . . ."

Id. at 71 n.1, *quoting* Bylaw A–II–14 of the Illinois High School Association. Other restrictions which the Illinois High School Association thought necessary for women included a prohibition on organized cheering, a $1 limit on the value of awards, and a prohibition of overnight trips. 351 F. Supp. at 71 n.2. For examples of similar restrictions, *see* Morris v. Michigan State Bd. of Educ., 472 F.2d 1207, 1208 (6th Cir. 1973); Gilpin v. Kansas State High School Activities Ass'n, 377 F. Supp. 1233, 1236 (D. Kan. 1974); Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258, 260 (D. Neb. 1972); Haas v. South Bend Community School Corp., 259 Ind. 515, 521–22, 289 N.E.2d 495, 498 (1972).

79. Since the actions were filed by public school students against their schools, school districts, and/or statewide school athletic associations, the requisite finding of state action presented little problem. The fourteenth amendment, as implemented by section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970), furnishes the basis of a claim for relief only if the rule or practice in issue is found to be state action or action under color of state law. Voluntary school associations have been found to act under color of state law since their existence is dependent upon participation of the public schools, which are tax-supported institutions. *See* Mitchell v. Louisiana High School Athletic Ass'n, 430 F.2d 1155 (5th Cir. 1970); Oklahoma High School Ass'n v. Bray, 321 F.2d 269 (10th Cir. 1963); Bucha v. Illinois High School Ass'n, 351 F. Supp. 69 (N.D. Ill. 1972); *Equality in Athletics, supra* note 5, at 430–31. The Little League organization has been found to act under color of state law. *See* Fortin v. Darlington Little League, Inc., 514 F.2d 344, 346–48 (1st Cir. 1975). The only authorities holding that voluntary school associations do not act under color of state law are Kelly v. Wisconsin Interscholastic Athletic Ass'n, 367 F. Supp. 1388 (E.D. Wis. 1974), and Magill v. Avonworth Baseball Conference, 364 F. Supp. 1212 (W.D. Pa. 1973).

80. *See* notes 85–102 and accompanying text *infra*.

81. *See* notes 109–13 and accompanying text *infra*.

the sport was one involving physical contact;[82] and 4) the type of evidence to be considered.[83]

In general, equal protection claims have arisen in two factual situations. First is the complete failure of a school to fund a particular team for its women students, while at the same time prohibiting women from joining the corresponding men's team.[84] Under such circumstances, most courts have found a fourteenth amendment violation. The issue in these cases was not whether a woman has a constitutional right to participate in a particular sport,[85] but whether the state, having provided an athletic program, can deny an opportunity for equal participation to members of one sex.[86] The state cannot do so unless it offers[87] a reason for the sex-based restriction which the court is willing to accept.[88] Applying the middle

82. *See* notes 114–17 and accompanying text *infra.*

83. *See* notes 100 & 128 and accompanying text *infra.* Other factors which have influenced the outcome of some suits were whether the case was filed in class action form and whether the passage of time mooted the case so far as the plaintiff was concerned. In Ritacco v. Norwin School Dist., 361 F. Supp. 930 (W.D. Pa. 1973), the court ruled that the plaintiff's graduation from high school had mooted the case as to her and barred her from representing the class. *Id.* at 931. The court added that the requirements of rule 23(a) of the Federal Rules of Civil Procedure had not been met; it was unclear whether the class consisted of women participating in interscholastic sports contests or those who would do so only if they could compete with males. The court expressed doubt that there was a class at all, and noted a lack of evidence demonstrating that other women students believed that their constitutional rights had been infringed by the defendant's rule requiring sex-segregated athletic teams in all sports. *Id. But cf.* Bucha v. Illinois High School Ass'n, 351 F. Supp. 69, 71–72 (N.D. Ill. 1972), wherein plaintiff was permitted to represent a class consisting both of females of exceptional athletic ability who might wish to compete against men, and females who might wish to participate in programs separate from but equal to those provided for men. *See also* Brenden v. Independent School Dist. 742, 342 F. Supp. 1224 (D. Minn. 1972), *aff'd,* 477 F.2d 1292 (8th Cir. 1973). Both the district and the circuit courts were careful to point out that the suit was not a class action, and emphasized that the relief granted — ordering admission of the two plaintiffs to the formerly all-male cross country and skiing teams — applied only to the plaintiffs, both of whom were exceptional athletes. *Id.* at 1231–32; 477 F.2d at 1301–02.

84. *See, e.g.,* Haas v. South Bend Community School Corp., 259 Ind. 515, 523, 289 N.E.2d 495, 499 (1972).

85. In State *ex rel.* Indiana High School Athletic Ass'n v. Lawrence, 240 Ind. 114, 162 N.E.2d 250 (1969), the court stated that "the right of the plaintiffs to go to public schools and receive education and training cannot properly be said to include interscholastic sports and games." *Id.* at 124, 162 N.E.2d at 255. *See also* Brenden v. Independent School Dist., 477 F.2d 1292, 1297 (8th Cir. 1973); Gilpin v. Kansas State High School Activities Ass'n, 377 F. Supp. 1233, 1240–41 (D. Kan. 1974).

86. *See* Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258, 262 (D. Neb. 1972); Haas v. South Bend Community School Corp., 259 Ind. 515, 521–26, 289 N.E.2d 495, 498–501 (1972).

87. The burden of proof has been placed on the defendants in these cases to demonstrate that the classification bears a substantial relation to a legitimate state purpose. *See* Gilpin v. Kansas State High School Activities Ass'n, 377 F. Supp. 1233, 1242 (D. Kan. 1974); Brenden v. Independent School Dist., 342 F. Supp. 1224, 1232–33, *aff'd,* 477 F.2d 1292 (8th Cir. 1973); Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258, 261 (D. Neb. 1972); Haas v. South Bend Community School Corp., 259 Ind. 515, 522–23, 289 N.E.2d 495, 498–99 (1972).

88. A holding that the fourteenth amendment had not been violated could also result if the court found that the men and women students were not similarly situated. Such has been held when sex segregation in contact sports was being challenged. *See*

level scrutiny standard of review articulated in *Reed v. Reed,*[89] the courts have rejected justifications for sex discrimination in athletic programs which would have been sufficient had a lower level of scrutiny been applied.[90] Upon examining and weighing the character of the classification, the individual interests affected thereby, and the governmental interests asserted in support thereof,[91] the courts have rejected: 1) the state's fiscal interest in providing only one all-male team, offered as a defense in *Reed v. Nebraska School Activities Association*[92] and *Haas v. South Bend Community School Corp.*;[93] 2) the argument that participation in athletics is a privilege and not a right, advanced by the defendants in *Brenden v. Independent School District 742*[94] and *Gilpin v. Kansas State High School Activities Association;*[95] 3) the administrative convenience rationale, pressed in *Gilpin;* and 4) an asserted protective purpose in maintaining sex segregation in athletics, urged by the defendants in *Haas*[96] and *Brenden.*[97] This asserted protective purpose in maintaining separate teams was premised upon the conclusion that women cannot compete effectively

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Morris v. Michigan State Bd. of Educ., 472 F.2d 1207 (6th Cir. 1973); Haas v. South Bend Community School Corp., 259 Ind. 515, 522–23, 289 N.E.2d 495, 498 (1972). The courts have assumed that women are incapable of competing on an equal basis with men in contact sports such as hockey, wrestling, and football; but if the suit is not a class action and if the plaintiff has demonstrated her ability to compete, it would seem that a rule prohibiting women from competing would have to be found to discriminate against that particular plaintiff. The argument becomes even stronger when all men are permitted to participate on the team regardless of athletic ability, but no women are admitted despite demonstrated athletic excellence. *See* Gilpin v. Kansas State High School Activities Ass'n, 377 F. Supp. 1233, 1241 (D. Kan. 1974). For a further discussion of sex segregation in contact sports, *see* notes 114–17 and accompanying text *infra.*

89. For an analysis of *Reed v. Reed, see* notes 15–21 and accompanying text *supra.*

90. *See* notes 12 & 13 and accompanying text *supra.*

91. Gilpin v. Kansas State High School Activities Ass'n, 377 F. Supp. 1233, 1239 (D. Kan. 1974), *quoting* Dunn v. Blumstein, 405 U.S. 330, 336 (1972).

92. 341 F. Supp. 258, 262–63 (D. Neb. 1972). The court noted that the association had presented no evidence of a cost increase, but had merely presented the conclusion that permitting the plaintiff to participate on the all-male team would be too costly. *Id.* The implication of *Reed* was that if a material cost increase could be shown, the sex segregation might be upheld.

93. 259 Ind. 515, 525, 289 N.E.2d 495, 500 (1972). In *Haas,* the defendant school offered no concrete evidence on the cost factor. The court noted that its decision would not require the defendant to expand existing programs or to implement new ones. *Id.; cf.* Geduldig v. Aiello, 417 U.S. 484 (1974); notes 40–59 and accompanying text *supra.*

94. 477 F.2d 1292, 1297 (8th Cir. 1973).

95. 377 F. Supp. 1233, 1240–41 (D. Kan. 1974). *See also* Reed v. Nebraska High School Activities Ass'n, 341 F. Supp. 258, 262 (D. Neb. 1972). The privilege/right argument is actually procedural in nature; if no constitutional right has been infringed, there is no cause of action under section 1983, 42 U.S.C. § 1983 (1970). While the courts have agreed that participation in interscholastic sports is not a constitutional right, they have framed the question to be whether female students can be denied the benefit of participating in activities available to male students solely because of sex. Brenden v. Independent School Dist., 477 F.2d 1292, 1297 (1973).

96. 259 Ind. at 522–24, 289 N.E.2d at 498–500.

97. 342 F. Supp. at 1233.

with men in sports because of the inherent physical differences between the sexes; thus, it was argued, separate teams were reasonable, indeed, necessary. Several courts accepted this conclusion,[98] but held, nevertheless, that they could not sanction a failure to provide *any* athletic program for women.[99] This was especially true in view of the school's asserted purpose in maintaining interscholastic athletics, which was to "provide students with the opportunity to cultivate good mental habits and to develop their physical abilities."[100] The appellation "student" presumably includes members of both sexes, and any argument that women have less of a need to develop their physical and mental abilities than do men is redolent of the sort of sex stereotyping condemned by the Supreme Court.[101]

As demonstrated by the preceding decisions, the situation in which the plaintiff was faced with the alternatives of either gaining admission to the men's team or not taking part in a particular sport at all gave the courts relatively little difficulty.[102] A more difficult problem was presented by the second type of factual situation — where a separate program for women did exist, but the plaintiff wished either to gain entry to the men's team or to invalidate restrictions on competition between the separate teams. In *Bucha v. Illinois High School Association,*[103] plaintiffs sought to do both. They had access to an athletic program which featured a swimming team, the activity of special interest to them, but it was subject to restrictions not placed upon the men's team.[104] Plaintiffs asserted that the

98. Brenden v. Independent School Dist., 342 F. Supp. 1224, 1242–43 (D. Minn. 1972); Haas v. South Bend Community School Corp., 259 Ind. 515, 522–24, 289 N.E.2d 495, 498–500 (1972).

99. *E.g.,* Gilpin v. Kansas State High School Activities Ass'n, 377 F. Supp. 1233, 1242 (D. Kan. 1974).

100. *See, e.g.,* the oft-cited language of Judge Lord, writing for the court in *Brenden:*

> There are, of course, substantial physiological differences between males and females. As testified to by defendant's expert witnesses, men are taller than women, stronger than women by reason of a greater muscle mass; have larger hearts than women and a deeper breathing capacity, enabling them to utilize oxygen more efficiently than women, run faster, based upon the construction of the pelvic area, which, when women reach puberty, widens, causing the femur to bend outward, rendering the female incapable of running as efficiently as a male. These physiological differences may, on the average, prevent the great majority of women from competing on an equal level with the great majority of males. The differences may form a basis for defining class competition on the basis of sex, for the purpose of encouraging girls to compete in their own class and not in a class consisting of boys . . . .

342 F. Supp. at 1233. *Compare* the evidence accepted by the court of appeals in Fortin v. Darlington Little League, Inc., 514 F.2d 344, 348–51 (1st Cir. 1975), *with* the conclusion reached by Wilmore, *Inferiority of Female Athletes: Myth or Reality,* 3 JOURNAL OF SPORTS MEDICINE 1, 5–6 (1975).

101. *See* notes 29 & 60 and accompanying text *supra.*

102. *See* Gilpin v. Kansas State High School Activities Ass'n, 377 F. Supp. 1233 (D. Kan. 1974); Brenden v. Independent School Dist., 342 F. Supp. 1224 (D. Minn. 1972), *aff'd,* 477 F.2d 1292 (8th Cir. 1973); Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258 (D. Neb. 1972); Haas v. South Bend Community School Corp., 259 Ind. 515, 289 N.E.2d 495 (1972).

103. 351 F. Supp. 69 (N.D. Ill. 1972).

104. For the text of the regulation involved in *Bucha, see* note 78 *supra.*

women's contests were "purposely conducted in a manner that emphasizes the intramural, multisport activities which are devoid of the concentration and competitive emphasis that is characteristic of boys' extracurricular sports."[105] The complaint was dismissed on a motion for summary judgment, with the defendant conceding, and the court noting, that there existed real differences between the two programs[106] which made them separate and unequal. The court found the sex-based classification and the disproportionate treatment to be rational because "the 14th amendment does not create a fictitious equality where there is a real difference."[107] Great emphasis was placed upon the fact that women did have their own program.[108]

The difference in outcome between *Bucha* and the *Haas, Reed v. Nebraska, Brenden,* and *Gilpin* quartet of decisions can be explained[109] by two factors. First, the *Bucha* plaintiffs could swim in their own pool, so to speak, even though the complaint was that the pool was too shallow, while the plaintiffs in the latter cases did not even have this dubious advantage. Second, the *Bucha* court applied a different standard of review than that applied by the courts in the *Haas* quartet. The *Bucha* court opined that *Reed v. Reed* had utilized minimum scrutiny,[110] so that only a rational, not a fair and substantial, relation between the purpose of the program and the classification needed to be shown. *Haas* and subsequent cases viewed *Reed* as mandating the application of a more stringent standard of review to the school's justifications for the differences in treatment between the sexes.[111]

The appellate court in *Morris v. Michigan State Board of Education*[112] concurred with the *Bucha* court's opinion that *Reed* represented nothing more than an application of minimum scrutiny to a sex-based classification.[113] Nevertheless, the court found that standard sufficient to compel it to affirm the district court's issuance of a temporary injunction prohibiting the exclusion of women from varsity interscholastic athletics — with one

105. 351 F. Supp. at 71.

106. *Id.* at 72, 74.

107. *Id.* at 74, *quoting* Quong Wing v. Kirkendall, 223 U.S. 59, 63 (1912). The court was convinced that there was a "real difference" in the athletic abilities of men and women because not only were the men's times in each Olympic event better than those of women, but because the two male swimmers whom Hinsdale, Illinois sent to the state championship contest scored better than either of the female plaintiffs ever had. 351 F. Supp. at 74. The *Bucha* court also cited the language of *Brenden* (*see* note 100 *supra*) as evidence of the difference in athletic prowess between the sexes. *Id.* at 74–75 n.3. Conflicting evidence introduced by the plaintiffs justified the exercise of judicial restraint since, the court stated, the experts disagreed. *Id.* at 75.

108. *Id.* at 74–75.

109. For a comparison of *Bucha* with *Reed v. Nebraska, Brenden,* and *Haas, see* 50 CHI. KENT L. REV. 169 (1973).

110. 351 F. Supp. at 74.

111. 351 F. Supp. at 74; *see* note 17 *supra.* Most courts and commentators have viewed *Reed* as announcing a stricter standard of review than that found under the rational relation test. *See, e.g.,* note 109 *supra. See generally* Gunther, *supra* note 14.

112. 472 F.2d 1207 (6th Cir. 1973).

113. *Id.* at 1209; *see* note 17 *supra.*

exception. The lower court had banned sex segregation in athletics generally, but the court of appeals modified the order, making it applicable to noncontact sports only.[114] The *Morris* decision illustrates the dichotomy in treatment accorded contact sports and noncontact sports, even when sex segregation means that women will be unable to participate in the particular sport because the school does not provide a team for them. This dichotomy has been carried over from case law into section 86.41 of the Title IX regulations.[115]

B. *The Little League Cases: Women on First*

Baseball has traditionally been considered a contact sport,[116] necessitating separate teams for boys and girls.[117] In 1964, Congress, in order to teach young men appropriate values, conferred federal corporation status upon the Little League organization.[118] The objectives of the corporation were defined as follows:

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114. *Id.* After the preliminary injunction had been entered, and perhaps because of it, the Michigan legislature enacted the following law:

> Female pupils shall be permitted to participate in all noncontact interscholastic athletic activities . . . . Even if the institution does have a girls' team in any noncontact interscholastic athletic activity, the female shall be permitted to compete for a position on the boys' team. Nothing in this subsection shall be construed to prevent or interfere with the selection of competing teams on the basis of athletic ability.

Id., citing MICH. COMP. LAWS ANN. § 340.379(2) (1972). The passage of the law did not compel the court of appeals decision in *Morris* because the law did not become effective until after the decision had been handed down. 472 F.2d at 1209.

115. 40 Fed. Reg. 24142–43 (1975); *see* notes 146–49 and accompanying text *infra.*

116. *See, e.g.,* Magill v. Avonworth Baseball Conference, 364 F. Supp. 1212 (W.D. Pa. 1973), wherein the court took judicial notice that baseball is a contact sport. *Id.* *Id.* at 1216.

117. In Magill v. Avonworth Baseball Conference, 364 F. Supp. 1212 (W.D. Pa. 1973), the court accepted evidence indicating that girls should not participate in the same Little League team with boys. The court stated:

> [Y]oung girls would be endangered physically if allowed to compete with the boys in organized baseball and . . . to permit the girls to compete would destroy the program already underway because the boys would drop out. . . .
>
> The directors have had a great deal of experience with boy's baseball and have formed the opinion after mature consideration that girls would not fare well in physical contact with the boys. They admit that there are excellent girl athletes but contend that they should not be placed in physical contact with boys.

Id. at 1216.

118. Act of July 16, 1964, Pub. L. No. 88–378, 78 Stat. 325. For a statement of some of the reasons for the granting of the federal charter, *see* S. REP. No. 1154, 88th Cong., 2d Sess. 1 (1964). The Senate report stated:

> Over a period of years, the Little League Baseball Organization has done a great deal to achieve widespread participation by American youth in the traditional game of baseball. Its program has done much to encourage physical fitness, to teach the value of team play, and to instill the spirit of sportsmanship.
>
> [I]t is estimated that 1.25 million boys participate annually in Little League baseball. . . .
>
> The committee believes that the granting of a Federal charter would be appropriate recognition of the national stature which the Little League has attained. . . .

Id.

> (1) To promote . . . and . . . assist the interest of *boys* who will participate in Little League baseball.
>
> (2) To help . . . *boys* in developing qualities of citizenship, sportmanship and *manhood.*
>
> (3) Using the disciplines of the native American game of baseball, to teach spirit and competitive will to win, physical fitness through individual sacrifice, the values of teamplay and wholesome well-being through healthful association with other youngsters under proper leadership.[119]

Ten years and 22 class actions later,[120] Congress amended the Little League Corporation charter to require that both girls and boys be given the opportunity to participate in the League.[121] The congressional hearings emphasized the legislative intent that the Little League not establish separate programs for males and females, but integrate females into the existing programs on an equal basis.[122]

Despite a congressional mandate to the contrary, potential female Little Leaguers continued to encounter resistance on the local level, as illustrated in *Fortin v. Darlington Little League, Inc.*[123] In *Fortin,* the district court upheld the defendant-organization's refusal to admit the plaintiff to its ranks.[124] Prior to plaintiff's appeal of that decision, the Little League's charter was amended to require admission of females, but, notwithstanding this development, the defendant continued to balk.[125] Relying upon its interpretation of the Supreme Court's sex discrimination decisions and the recent change in the Little League charter, the First Circuit reversed the district court's holding that the League had met its burden of proving that there was a convincing reason, apart from convention, for the sex segregation of youngsters between 8 and 12 years of age who wanted to play baseball.[126] The impact of *Fortin* was diluted by the court's limitation of its holding to girls between 8 and 12 years of age, and by its acceptance of the assumption that the differences in athletic abilities of the sexes increase as children mature.[127] The decision is

119. Act of July 16, 1964, Pub. L. No. 88-378, 78 Stat. 325 (emphasis added).

120. *See* H.R. REP. No. 1409, 93rd Cong., 2d Sess. 2 (1974). In National Organization for Women v. Little League Baseball, Inc., 127 N.J. Super. 522, 318 A.2d 33 (App. Div. 1974), a case which was decided prior to the amendment of the Little League's national charter, plaintiffs overcame the exclusion of girls from League activities by suing under a New Jersey statute which prohibited sex discrimination in places of public accommodation. *See* Law Against Discrimination, N.J. STAT. ANN. § 10:5-2(f) (Supp. 1975-76).

121. *See* 36 U.S.C. § 1073 (Supp. V, 1975), *amending* Pub. L. No. 88-378, 78 Stat. 325 (1964).

122. H.R. REP. No. 1409, 93rd Cong., 2d Sess. 2 (1974).

123. 514 F.2d 344 (1st Cir. 1975), *rev'g* 376 F. Supp. 472 (D.R.I. 1974).

124. 514 F.2d at 346.

125. *Id.*

126. *Id.* at 351.

127. *Id.* Judge Campbell, writing for the *Fortin* court, stated:

> Central to our decision, of course, are such factors as the ages of the children concerned, the uniqueness of the opportunity, and recent congressional assessment

significant nonetheless because of the court's close judicial scrutiny of the evidence[128] and its prohibition of both separate but equal and separate and unequal treatment of the sexes in a contact sport. *Fortin* has thus gone further than any other decision to promote an end to sexism in athletics.[129]

IV. TITLE IX OF THE 1972 EDUCATION AMENDMENT: BACK TO THE BENCH

A. *Title IX*

Title IX of the 1972 Education Amendments[130] (Title IX) prohibits any educational program receiving federal financial assistance from discriminating on the basis of sex.[131] The sanction for noncompliance is termination of federal aid to the specific educational entity which violated the Act.[132] The legislation follows a not unfamiliar statutory pattern — that of a general rule followed by exceptions.[133] It is submitted, however,

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of the situation. Nothing we say is meant to preclude recognition of bona fide distinguishing factors between the sexes in some sports at some ages and in some circumstances.

Id. While it is true that the Little League was open only to children of 12 years or under, the *Fortin* court implied that the outcome might have been different had teenagers been involved. *Id.*

128. For a summary of the evidence offered at trial, *see id.* at 349. The court of appeals noted that the evidence presented by the defendant's expert witness was "entirely impressionistic" and pointed out that no reason had been given for the rejection of the testimony of plaintiff's witness who was, the court implied, more experienced in working with children. *Id.* at 350.

129. For further discussion of how *Fortin* extends beyond and conflicts with the HEW regulation concerning contact sports, *see* notes 162–64 and accompanying text *infra.*

130. 20 U.S.C. §§ 1681 *et seq.* (Supp. V, 1975).

131. Section 901(a) of Title IX provides in part:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

Id. § 1681(a). This prohibition applies to "any public or private preschool, elementary or secondary school, or any institution of vocational, professional, or higher education . . . ." *Id.* § 1681(c).

132. *Id.* § 1682. There must be an express finding of noncompliance with an opportunity for a hearing. All measures to secure voluntary compliance must have been exhausted prior to termination of funding. *Id.* The halt of aid is limited to the particular entity found to be in violation of Title IX. *Id.* For a discussion of how the sanctions of Title IX can be applied to athletic programs which do not directly receive federal funds, *see Preventing Sex Discrimination, supra* note 1, at 107–13.

133. Section 901(a)(3) of Title IX provides an exception for schools controlled by religious organizations if Title IX's enforcement "would not be consistent with the religious tenents of such organization . . . ." 20 U.S.C. § 1681(a)(3) (Supp. V, 1975). Section 901(a)(4) exempts schools whose "primary purpose is the training of individuals for the military services . . . ." *Id.* § 1681(a)(4). Section 1681(a)(5) excepts any public undergraduate school which "traditionally and continually" has admitted only students of one sex. *Id.* § 1681(a)(5). Finally, section 1681(b) eliminates the need for implementation of affirmative action programs to correct the effects of past sex discrimination. *Id.* § 1681(b). For further discussion of Title IX and the exceptions noted above, *see* Buek & Orleans, *Sex Discrimination — A Bar to a Democratic Education: Overview of Title IX of the Education Amendments of 1972,* 6 CONN. L. REV. 1, 6–8 (1973).

that the Title IX exceptions serve to undermine the stated purpose of the legislation[134] rather than to define and further it.[135] Although Title IX was modeled, in some respects, upon Title VI of the Civil Rights Act of 1964,[136] which prohibited racial discrimination in any federally assisted program,[137] it "contains exemptions and deferments which enact into law significant popular as well as judicial indecision"[138] with regard to sex discrimination which are not found in Title VI.

Title IX does not directly address the issue of sex bias in athletic programs sponsored by the educational institutions within the statute's purview. However, Congress authorized the Department of Health, Education and Welfare (HEW) to prepare regulations implementing the provisions of Title IX,[139] and specifically mentioned the need for "reasonable provisions" governing intercollegiate athletic programs.[140]

B. *The HEW Regulations: Women Strike Out*

On June 20, 1974, approximately 2 years after Title IX was enacted, HEW issued proposed regulations for the statute's enforcement.[141] Section 86.38 of the proposed regulations set out guidelines for the administration of athletic programs.[142] Responding to an invitation to comment,[143]

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134. *See* notes 133 *supra* & 136 *infra.*

135. *See* notes 130 *supra* & 136 *infra.*

136. 42 U.S.C. §§ 2000d *et seq.* (1970). Title IX was originally introduced as an amendment to Title VI, with the intent of closing the "gap in the laws protecting women from biased educational policies," just as Title VI protected racial minorities from discrimination. *See* Buek & Orleans, *supra* note 133, at 2 n.5.

137. 42 U.S.C. §§ 2000d *et seq.* (1970).

138. Buek & Orleans, *supra* note 133, at 3. The authors observed:

> Legislatures and courts at all levels, reflecting views held in many parts of American society, perceive sex discrimination as less onerous or less invidious than discrimination based on race . . . . Thus, while Title VI reflects acceptance . . . of the Supreme Court's holding . . . that 'separate [educational] facilities are inherently unequal,' Title IX reflects a somewhat different concept. Specifically, it is now widely accepted that children should not be assigned to 'white' school[s] or 'Negro' school[s], but to 'just schools.' Title IX, however, reflects no such general acceptance that children should not be assigned to 'boys schools' or 'girls schools,' but to 'just schools.'

Id. at 2–3, *citing* Green v. New Kent County School Bd., 391 U.S. 430, 442 (1968), *and* Brown v. Board of Educ., 347 U.S. 483, 495 (1954).

139. 20 U.S.C. § 1681 (Supp. V, 1975), *amending* 20 U.S.C. § 1681 (1970). *See also* 20 U.S.C. § 1682 (Supp. V, 1975).

140. 20 U.S.C. § 1681 (Supp. V, 1975), *amending* 20 U.S.C. § 1681 (1970).

141. 39 Fed. Reg. 22228–22240 (1974).

142. *Id.* at 22236. Section 86.38 would have permitted school systems to "operate or sponsor" separate teams for members of each sex where selection was based upon competitive skill. Proposed HEW Reg. § 86.38(a), 39 Fed. Reg. at 22236. Equality in expenditures between the teams was not required. *Id.* § 86.38(f). There was a provision for annual determination of student interest in various sports, *id.* § 86.38(b), and a requirement that certain affirmative action programs be instituted. *Id.* § 86.38(c). These last two provisions were deleted from the regulation in its final form. *See* 40 Fed. Reg. 24134 (1975).

143. *See* note 4 *supra.*

various groups attacked the proposed regulation as either going too far[144] or not far enough,[145] but few changes were made. Adopted as section 86.41,[146] the regulation contains a general prohibition against sex-based discrimination in any school-sponsored athletic program.[147] However, section 86.41(b) creates an exception authorizing separate teams based upon sex "where selection for such teams is based upon competitive skill or the activity involved is a contact sport."[148] Section 86.41(b) further provides:

> [W]here a recipient offers or sponsors a team in a noncontact sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try out for the team offered *unless the sport involved is a contact sport.*[149]

Section 86.41(c) commands that recipients shall "provide equal athletic opportunity for members of both sexes"[150] and sets out a list of variables to be considered in determining whether or not the equal opportunity standard has been met. The variables include such items as the provision of equipment and supplies, travel and per diem allowance, coaching, facilities, and publicity.[151] The regulation states, however, that unequal aggregate expenditures for men and women or for sex-segregated teams does not automatically constitute noncompliance with Title IX.[152] Finally, elementary schools are granted 1 year to comply with the regulation while all other schools are given 3 years.[153]

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144. The National Collegiate Athletic Association (NCAA) argued that athletics were not covered by Title IX at all because the programs received no federal financial assistance. 1 WOMEN'S L. REP. 1.181 (1975). The Justice Department submitted a legal opinion that athletics were indeed within the statute's purview. *Id.* The NCAA then proposed that revenues earned by revenue producing intercollegiate sports be exempted from coverage under the regulation, which proposal was rejected by HEW. *See* 40 Fed. Reg. 24134 (1975).

145. Various women's rights advocates urged that the regulations be strengthened, pointing out that the concept of separate but equal had no place in civil rights legislation, and that equal access to all was the proper rule. *See* 1 WOMENS' L. REP. 1.181 (1975).

146. 45 C.F.R. § 86.41 (1975).

147. *Id.* Section 86.41(a) provides:

> No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from any other person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intermural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

Id. § 86.41(a).

148. *Id.* § 86.41(b).

149. *Id.* (emphasis added). Contact sports were defined to "include boxing, wrestling, rugby, ice hockey, football, basketball and other sports, the purpose or major activity of which involves bodily contact." *Id.*

150. *Id.* § 86.41(c).

151. *Id.*

152. *Id.*

153. *Id.* § 86.41(d).

By way of summary, section 86.41 permits: 1) separate teams where selection is based upon competitive skill; 2) separate and unequal teams when the sport involved is a contact sport; and 3) the possible total exclusion of women from participation in contact sports. It is submitted that section 86.41 conflicts both with other civil rights legislation and with the statement of congressional policy as expressed in the recently amended Little League Corporation Act, and that it violates the equal protection clause of the fourteenth amendment.

1. *Section 86.41 and Title VII of the Civil Rights Act of 1964*

The rationale of the section 86.41(b) provision authorizing separate teams based upon sex when the criterion for admission is competitive skill is unclear. One commentator[154] has suggested that it was intended to serve a function analogous to the bona fide occupational qualification (BFOQ) clause found in Title VII of the Civil Rights Act of 1964 (Title VII).[155] The BFOQ exception allows discrimination in hiring if sex is a BFOQ reasonably necessary to the normal operation of the business.[156] The Equal Employment Opportunity Commission (EEOC) has mandated that the BFOQ exception be interpreted narrowly[157] and that it not be construed to permit the perpetuation of sexual stereotypes.[158] The EEOC guideline states:

> The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group . . . .[159]

By the terms of this provision, it is conceivable that a team using competitive skill as a criterion for admission would use some objective standard to measure its applicants. Assessment would be on an individual basis — the sex of the applicant would be irrelevant and the only concern would be the person's athletic ability. Section 86.41, however, appears to be premised upon a viewpoint directly opposed to the EEOC interpretation of the principle of nondiscrimination. Indeed, the section embodies the

154. *Preventing Sex Discrimination, supra* note 1, at 103.

155. *See* 42 U.S.C. § 2000e–2(e) (1970). Title VII forbids discrimination in employment on the basis of race, color, religion, national origin, or sex. *Id.* However, section 703(e) of Title VII provides an exception to the general ban on discriminatory hiring practices for sex, religion and national origin, but not race, in the hiring of employees where such criteria are "bona fide occupational qualificational qualification[s] reasonably necessary to the normal operation of that particular business or enterprise . . . ." *Id.* § 2000(e)–2(e).

156. *See* note 155 *supra.*

157. 29 C.F.R. § 1604.2(a) (1975).

158. *Id.* § 1604.2(a)(1).

159. *Id.* § 1604.1(a)(1)(ii). An onerous burden of proof has been placed upon the employer to demonstrate the applicability of the BFOQ exception. For three different interpretations of the BFOQ exception, *see* Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir.), *cert. denied,* 404 U.S. 950 (1971); Cheatwood v. South Cent. Bell Tel. & Tel. Co., 303 F. Supp. 754 (M.D. Ala. 1969).

very assumption which the EEOC guidelines sought to invalidate. The regulations assume, based upon a sexual stereotype, that no woman will be able to meet whatever objective standard is set, and that at least some men will. The objective of Title IX was to give women "an equal chance . . . to develop the skills they want, and to apply those skills . . . ."[160] However, the HEW regulations relegate women to an inferior level, refusing to recognize the skills that some already possess and denying to others the incentive to develop those talents. Although section 86.41 permits women to try out for a team where the criterion for admission is competitive skill, when there is only one team and women have formerly been deprived of equal opportunity in the sport, the right is limited to noncontact sports.[161] Since the regulation contemplates two teams, the more rational procedure would be to separate members of each on the basis of ability rather than on the basis of sex, particularly in view of the statutory goal of Title IX to end discrimination in education.

2. *Section 86.41 and the Little League Corporation Act*

Baseball may be characterized by a school as a noncontact sport requiring a demonstration of competitive skill for team admission,[162] thus allowing the maintenance of separate teams; or, conversely, it may be termed a contact sport, opening up the possibility of total exclusion of women athletes. Congress, in amending the Little League charter, made it clear that it would not tolerate separate programs, equal or unequal.[163] The HEW must have been aware of the congressional action, since the amendment became effective well before the Title IX regulations were published. Yet HEW gave educators permission not only to segregate children on the basis of sex, but to deprive one sex of any chance to play on the school baseball team.[164] This difference in treatment between youngsters of the same age group who want to play the same game and who can do so, provided they are fortunate enough to have a Little League in their community, emphasizes the arbitrary and unfair results of concentrating upon any factor other than ability when administering athletic or, indeed, any educational programs.

3. *Section 86.41 and Equal Protection*

Section 86.41 allows complete exclusion of women from participation in a contact sport even where only one team has been provided by a

160. 118 CONG. REC. 5808 (1972) (remarks of Senator Bayh).

161. 45 C.F.R. § 86.41(b) (1975). Baseball is generally considered a contact sport. *See* notes 116 & 117 and accompanying text *supra.*

162. *See* 45 C.F.R. § 86.41(b) (1975).

163. *See* Fortin v. Darlington Little League, Inc., 514 F.2d 344, 345-46 (1st Cir. 1975), *rev'g* 376 F. Supp. 472 (D.R.I. 1974).

164. *Id.* However, the omission of baseball from the list of contact sports found in section 86.41(b) might be viewed as HEW recognition of the congressional policy behind the amendment to the Little League Corporation Act. *See* note 163 *supra.*

school.[165] It is submitted that a constitutional attack may be successfully mounted against the regulation upon the ground that it denies women equal protection of the laws solely because of their sex. The effect of the regulation is to deprive women totally of a benefit — the opportunity to compete in a contact sport — which has been extended to men. Viewed in this way, the second clause of subsection 86.41(b) falls within the prohibition articulated by the Supreme Court in *San Antonio Independent School District v. Rodriguez*.[166] Although the *San Antonio* Court declined to designate education, of which athletics is a part,[167] as a fundamental right,[168] the Court distinguished the complaint before them from prior decisions[169] wherein plaintiffs had alleged "an *absolute deprivation* of a meaningful opportunity to enjoy that benefit,"[170] and where a violation of equal protection had been found. An absolute deprivation of a meaningful opportunity to become involved in a contact sport solely because of one's sex would fail to pass constitutional muster under either the *Reed* standard of review[171] or the minimum scrutiny test.[172] If middle level scrutiny is applied, keeping women out of contact sports hardly bears a fair and substantial relation to the objectives of Title IX — ending biased educational policies[173] and giving women an equal opportunity to develop their potential and apply learned skills.[174] If minimum scrutiny is the standard of review, complete exclusion on the basis of sex is unconstitutional because it is "without any reasonable basis and therefore is purely arbitrary . . . ."[175] To be sure, it could be argued that there is a rationale for separating the sexes in contact sports — that of unequal athletic ability — but even if this rationale is accepted, it does not justify providing *no* team for women.[176] At the very least, potential plaintiffs should be able to establish

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165. 45 C.F.R. § 86.41(b) (1975); *cf.* note 161 *supra.*

166. 411 U.S. 1 (1973). In *San Antonio,* the Texas system of financing public schools was challenged as violative of equal protection by Mexican-American parents whose children attended those schools. *Id.* at 4–5. The parents argued that the system of financing impinged upon the fundamental right of education and argued that the Court use strict scrutiny to invalidate it. *Id.* at 17.

167. *See* note 3 and accompanying text *supra.*

168. 411 U.S. at 33–35. To be designated as fundamental, a right must be implicitly or explicitly protected by the Constitution. *Id.* at 33–34; *see* note 25 *supra.*

169. *Id.* at 20–22, *citing* Bullock v. Carter, 405 U.S. 134 (1972); Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

170. 411 U.S. at 20.

171. *See* notes 15–21 and accompanying text *supra.*

172. *See* note 12 *supra.*

173. *See* Beuk & Orleans, *supra* note 133, at 2.

174. 118 CONG. REC. 5808 (1972) (remarks of Senator Bayh).

175. 220 U.S. at 78; *see* note 12 *supra.*

176. *See* notes 96–101 and accompanying text *supra.*

their own team in any contact sport where a team has been provided for men.

The more difficult task is to marshal compelling arguments against the very concept of separate athletic teams for each sex, entrenched as this concept is in case [177] and statutory law.[178] Any challenge to separate sex-segregated athletic teams should be premised upon the argument that separate is inherently unequal.[179]

Subsection 86.41(c) lists various factors, from funding to publicity, which can vary between the two teams without a resultant finding of sex discrimination.[180] Assuming a rough equality in such aspects between the two teams, can there still be an equal protection violation? The answer depends upon whether the deciding court is willing to delve below the more visible manifestations of equality and scrutinize "intangible" factors that are entailed in sex segregation. Until recently, the analysis of intangible inequalities has been reserved to cases involving racial discrimination.[181] An intangibles analysis was used to find equal protection violations in the Supreme Court trilogy of *Sweatt v. Painter,*[182] *McLaurin v. Oklahoma State Board of Regents,*[183] and *Brown v. Board of Education.*[184] Each decision carried the analysis a step further. In *Sweatt,* black students were relegated to their own law school, which was inferior in tangible and intangible respects.[185] Speaking of the intangible inequality perpetuated by the racial segregation, the Court stated:

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177. *See* notes 92–101, 103–107 & 112–115 and accompanying text *supra.*

178. *See* notes 146–153 and accompanying text *supra.*

179. *Cf.* Brown v. Board of Educ., 347 U.S. 483, 495 (1954).

180. Section 86.41(c) provides in pertinent part:

> In determining whether equal opportunities are available, the Director will consider, among other factors:
> (i) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
> (ii) The provision of equipment and supplies;
> (iii) Scheduling of games and practice time;
> (iv) Travel and per diem allowance;
> (v) Opportunity to receive coaching and academic tutoring;
> . . . .
> (vii) Provision of locker rooms, practice and competitive facilities;
> . . . .
> (x) Publicity.
> Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams . . . will not constitute noncompliance with this section, but the Director may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity . . . .

40 Fed. Reg. 24143 (1975).

181. Within the last few years, courts have been analyzing intangible factors in deciding some sex discrimination cases. *See* Vorchheimer v. School Dist., 400 F. Supp. 326, 328–30 (E.D. Pa. 1975), *rev'd,* 532 F.2d 880 (3d Cir.), *cert. granted,* 45 U.S.L.W. 3501 (U.S. Oct. 10, 1976) (No. 76–37); Kirstein v. Rectors & Visitors of the Univ. of Va., 309 F. Supp. 184, 187 (E.D. Va. 1970).

182. 339 U.S. 629 (1950).

183. 339 U.S. 637 (1950).

184. 347 U.S. 483 (1954).

185. 339 U.S. at 632–34.

> What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name a few, include reputation of the faculty . . . standing in the community, traditions and prestige.[186]

In *McLaurin,* black students were permitted to matriculate in the same graduate school as white students but, pursuant to state law, they had to sit in special areas reserved for them in the classroom, the library, and the cafeteria.[187] Although the state argued that such segregation was "merely nominal,"[188] the Court disagreed:

> These restrictions . . . signify that the State . . . sets McLaurin apart from other students. The result is that appellant is handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.[189]

Finally, in *Brown,* the Court observed:

> Here, unlike *Sweatt v. Painter,* there are findings below that the Negro and white schools involved have been or are being equalized, with respect to . . . 'tangible' factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors . . . . We must look instead to the *effect* of segregation . . . .
>
> . . . .
>
> [Education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training . . . . Such an opportunity, where the State has undertaken to provide it, is a right which must be made available to all on equal terms.
>
> We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate education facilities are inherently unequal.[190]

The obstacles that had been placed in the way of blacks who sought to achieve academic excellence strongly resemble those which section 86.41 places in the path of women seeking to achieve excellence in athletics. Men's teams, particularly in high school and college, have traditionally enjoyed the benefits of greater funding, better equipment and coaching, and greater prestige than have women's teams[191] — factors considered significant in

186. *Id.* at 633.

187. *Id.* at 640.

188. *Id.*

189. *Id.* at 641.

190. 347 U.S. 483, 492-95.

191. *See Hearings on S. 2518 Before the Senate Comm. on Labor and Public Welfare,* 92nd Cong., 1st Sess (1973) (testimony of Ms. Billie Jean King). One blatant example of tangible inequality cited by Ms. King concerned Vassar College, which had a student body of 1400 women and 700 men in 1973. The sum of $2,000 was spent on the women's athletic program, while $4,750 was spent on the men's program. *Id.*

the *Sweatt* opinion.[192] Restricting women to their own, less prestigious teams arguably impairs and inhibits the skilled woman athlete from interacting with her peers on an equal basis, to use the language of the *McLaurin* Court.[193] She is stigmatized as inferior and unable to compete because, as the Court stated in *Brown,* separate is inherently unequal.[194]

Plaintiffs wishing to challenge section 86.41 must be prepared to deal with the argument that it is only the exceptional woman who is injured by the regulation since most women are simply physically incapable of competing with men, particularly in contact sports. It is not at all clear whether this assumption has any basis in fact,[195] but at this point there is certainly no reason to conclude that it does. Allowances must be made for the effect of past discrimination and the lack of serious athletic training upon the development of female athletic prowess.[196] The Supreme Court has indicated that archaic and overbroad generalizations about the capabilities of women are not to be made the basis of statutory classifications;[197] it is too soon to determine that section 86.41's sex-based classification is neither archaic nor overbroad. It should be asked whether there is any valid justification for separation of the sexes other than convention[198] and administrative convenience.[199] The Supreme Court's sex discrimination decisions indicate the need to assess the individual capabilities of members of a class.[200] The alternative to section 86.41's sex-based classification system — ability grouping — does exactly that.[201]

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192. 339 U.S. at 633.

193. *Id.* at 641.

194. 347 U.S. at 492–95.

195. Experts disagree on the matter. *See* Fortin v. Darlington Little League, 514 F.2d 344 at 349; note 100 and accompanying text *supra.* One court, confronted with an analogous argument in defense to a charge of sex discrimination in employment advertising, answered it as follows:

> The 'separate but equal' principle is no longer a legitimate argument in civil rights cases . . . .
>
> To anyone who even once has viewed women participating in a roller derby, the argument that all women are the weaker sex, desirous of only the more genteel work, carries little weight. The success of women jockies is further evidence of which we can take notice. It is no longer possible to state that all women desire . . . any one type . . . of work. Some women have the desire, ability and stamina to do any work that men can do. Once we accept such a premise, it then becomes logically impossible to permit continued segregation . . . .

Pittsburgh Press v. Pittsburgh Comm'n on Human Relations, 4 Pa. Cmwlth. 448, 461–62, 287 A.2d 161, 168–69 (1972).

196. It is not at all unusual for courts to consider the effects of past discrimination in assessing the constitutionality of legislation. *See, e.g.,* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

197. *See* notes 29, 55 & 60 and accompanying text *supra.*

198. *See* note 122 and accompanying text *supra.*

199. *See* notes 18 & 22 and accompanying text *supra.*

200. *See* notes 21 & 76 and accompanying text *supra.*

201. The irrebuttable presumptions doctrine (*see* note 76 *supra*) suggests an additional argument, based upon due process grounds, which can be levelled against section 86.41. Section 86.41 arguably "serve[s] to hinder attainment of the very . . . objectives [it] is designed to promote" — equal athletic opportunity — on the basis of a presumption "neither necessarily nor universally true in fact," and despite the

V. CONCLUSION

The alternative to section 86.41 and the entire separate but equal system is simple enough — that schools classify by ability rather than by sex.[202] Classification by sex is stigmatizing; it influences the individual's sense of self-worth. It appears likely that women placed on separate teams because they supposedly cannot compete with men and cannot even be allowed to try will be consigned to a separate, less demanding program.[203] As one commentator has stated, "[t]he initial assignment becomes a self-fulfilling prophesy; as the child goes on . . . she will be less and less able to compete."[204] Thus, sex discrimination and sexual stereotypes will be perpetuated, as young women come to accept society's judgment of their potential.[205] If such a system is permitted to exist, the government should at least be required to bear the burden of demonstrating that the sex-based segregation is not as arbitrary as it seems — that it sufficiently benefits young women so as to justify the "inevitable stigma" that it creates.[206]

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existence of a reasonable alternative means of making the crucial determination — the measuring of athletic ability on an individual basis. Cleveland Bd. of Educ. v. LeFleur, 414 U.S. 632, 643-47 (1974).

One problem with the due process challenge to section 86.41, however, is that the irrebuttable presumptions doctrine has been limited to cases where a fundamental constitutional right has been unduly burdened or infringed. *Id.* at 651. Recent decisions have stressed that there is no constitutional right to participate in sports (*see* note 85 and accompanying text *supra*), and that education, of which athletics is a part, is not a fundamental right. *See* notes 3 & 166-168 and accompanying text *supra*.

202. The alternative would probably be mandatory should the federal Equal Rights Amendment (ERA) be adopted. "The basic principle of the ERA is that sex is not a permissible factor in determining the legal rights of women or of men." Brown, *supra* note 10, at 889.

There has been one case concerning sex discrimination in athletics decided under Pennsylvania's ERA. That decision invalidated any sex segregation in athletics, including contact sports. *See* Pennsylvania v. Pennsylvania Interscholastic Athletic Ass'n, 18 Pa. Cmwlth. 45, 334 A.2d 839 (1975).

203. *Cf.* Kirp, *supra* note 2, at 733-35.

204. *Id.* at 735.

205. *Id.*

206. *Id.* at 750.